United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1903.

No. 1258. 188

THE BOKEE, GWYNN, McKENNEY COMPANY,
APPELLANT,

vs.

JOHN F. COSTELLO.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 15, 1902.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1903.

No. 1258.

THE BOKEL, GWYNN, McKENNEY COMPANY, APPELLANT,

vs.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 5, 1903.

In the Court of Appeals of the District of Columbia.

THE BOKEL, GWYNN, MCKENNEY COMPANY, Appellant,
vs.
JOHN F. COSTELLO.
} No. 1258.

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a Supreme Court of the District of Columbia.

THE BOKEL, GWYNN, MCKENNEY COMPANY,
Plaintiff,
vs.
JOHN F. COSTELLO, Defendant.
} No. 44755. At Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Affidavit of Defendant John F. Costello.*

Filed June 23, 1902.

In the Supreme Court of the District of Columbia.

THE BOKEL, GWYNN, MCKENNEY CO.
vs.
JOHN F. COSTELLO.
} Law. No. 44755.

John F. Costello, the defendant above named, being first duly sworn, deposes and says: That he has read the affidavit of Albert H. Wilson, treasurer of the corporation plaintiff, dated June 20—1901, upon which the *capias ad satisfaciendum* was issued in the above cause; that he, affiant, did not convey away, lessen or dispose of his property, rights and credits with intent thereby to hinder and delay the recovery of his debts as charged in plaintiff's affidavit; that he did not execute and deliver to Jeremiah A. Costello a conveyance of the real estate described in plaintiff's affidavit for the purpose of hindering or delaying the recovery or payment of his, affiant's, debts, and without consideration being paid therefor; as charged in said plaintiff's affidavit.

And affiant joins issue upon the plaintiff's affidavit charging that he conveyed away, lessened or disposed of his property, rights and credits with intent thereby to hinder or delay the recovery of his debts.

JOHN F. COSTELLO.

Sworn to and subscribed before me this 23rd day of June, 1902.

GUY H. JOHNSON,
Notary Public, D. C.

[SEAL.]

2 *Call on Plaintiff to Show Cause Why He be Not Discharged from Custody.*

Filed June 24, 1902.

In the Supreme Court of the District of Columbia.

THE BOKEL, GWYNN, MCKENNEY CO.
vs.
JOHN F. COSTELLO.
} Law. No. 44755.

To Levi David, Esq., attorney for plaintiff:

Take notice that I have procured a writ of *habeas corpus* in the above-cited cause and that the marshal has produced the body of the defendant in court in obedience to said writ. You are hereby called upon to show cause forthwith why he, the defendant should not be discharged from imprisonment.

CRANDAL MACKEY,
Attorney for Defendant.

June 24, 1902.

Service accepted this 24th day June, 1902.

LEVI H. DAVID,
Attorney for Plaintiff.

3 Supreme Court of the District of Columbia.

TUESDAY, *June* 24, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham, presiding.

* * * * * * *

THE BOKEL, GWYNN, MCKENNEY CO., Plaintiff,
vs.
JOHN F. COSTELLO, Defendant.
} At Law. No. 44755.

This day the marshal of this District produced before the court the body of the said John F. Costello in obedience to the writ of *habeas corpus* to him directed, and thereupon the said defendant

called upon the plaintiff to show cause why he should not be discharged from imprisonment upon the writ of *capias ad satisfaciendum* heretofore issued in this case, and for cause against such discharge the plaintiff read to the court the affidavit filed by it in pursuance of which said writ of capias was issued; and thereupon it is ordered that the following issue be tried before a jury at the bar of the court, to wit: Did the defendant, John F. Costello, on or about the 4th day of May, 1901, convey away, lessen or dispose of to his brother, Jeremiah A. Costello, his property, rights or credits, with intent thereby to hinder or delay the recovery of payment of the debts of the said John F. Costello?

4 It is ordered that this case be, and hereby is, certified to criminal court No. 2, for trial on Thursday next, and that the jury in attendance upon said court be notified to appear in said court on said day.

The defendant John F. Costello is hereby remanded to the custody of the marshal to await said trial.

Issue for Trial on Ca. Sa.

Filed June 24, 1902.

In the Supreme Court of the District of Columbia.

THE BOKEL-GWYNN MCKENNEY COMPANY, OF Baltimore City, a Corporation, Plaintiff,
vs.
JOHN F. COSTELLO, Defendant.
} At Law. No. 44755.

It is this the — day of June, 1902, by the court ordered, that the following issue be and it hereby is ordered for trial on the — day of —— 1902:

Did the defendant, John F. Costello, on or about the 4th day of May, 1901, convey away, lessen or dispose of to his brother, Jeremiah A. Costello, his property, rights or credits, with intent thereby to hinder or delay the recovery or payment of the debts of the said John F. Costello? No.

5 Supreme Court of the District of Columbia.

THURSDAY, *June* 26, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

The following case was certified to criminal court No. 2, Justice Anderson presiding.

THE BOKEL, GWYNN, MCKENNEY COMPANY, OF Baltimore City, a Corporation, Plaintiff,
vs.
JOHN F. COSTELL-, Defendant.
} Law. No. 44755.

Now come here as well the plaintiff by its attorney Levi H. David, as the defendant by his attorney Crandal Mackey, and a jury of good and lawful men of this District, to wit: D. D. Thompson, Chas. E. Wise, H. W. Nichols, Randolph Ridgley, Harry Norment, Jno. A. Prescott, Geo. Peter, C. C. Arnold, Jno. C. Cook, W. A. Pate, Jr., Jno. Mitchell, and S. N. Landers, who being duly sworn to try the issue herein relating to the *habeas corpus* proceeding of the defendant, after the case is given them in charge, upon their oath say in answer to said issue: "Did the defendant, John F. Costello, on or about the 4th day of May, 1901, convey away, lessen or dispose of to his brother, Jeremiah A. Costello, his property, rights, or credits, with intent thereby to hinder or delay the recovery or payment of the debts of the said John F. Costello?" They answer "No."

6 Whereupon it is considered that the writ of *capias ad satisfaciendum* be, and the same is hereby quashed and for nothing held, and that the defendant be discharged without day, and recover against the plaintiff the costs of this proceeding.

Order for Citation.

Filed July 15, 1902.

In the Supreme Court of the District of Columbia, the 3rd Day of July, 1902.

THE BOKEL-GWYNN, MCKENNEY CO.
vs.
JOHN F. COSTELLO.
} At Law. No. 44755.

The clerk of said court will enter an appeal from the judgment herein to the Court of Appeals of the District of Columbia and issue citation to the defendant.

LEVI H. DAVID,
Attorney for Plaintiff.

7 Filed Jul- 16, 1902. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

THE BOKEL-GWYNN MCKENNEY CO.
vs.
JOHN F. COSTELLO.
} At Law. No. 44755.

The President of the United States to John F. Costello, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the

cause therein, under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia, on the 15th day of July, 1902, wherein The Bokel-Gwynn McKenney Co. is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this fifteenth day of July, in the year of our Lord one thousand nine hundred and two.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 16th day of July, 1902.

HENRY E. DAVIS,
Attorney for Appellee.

8 *Memorandum.*

July 16, 1902.—Appeal bond filed.

Memoranda.

July 21, 1902.—Time to settle bill of exceptions extended to October 1, and time to file transcript extended to October 15.

Sept. 16, 1902.—Time to settle exceptions extended to November 1, and to file transcript to November 15, 1902.

Stipulation Between Counsel.

Filed October 20, 1902.

In the Supreme Court of the District of Columbia.

THE BOKEL-GWYNN, MCKENNEY CO., Plaintiff, *vs.* JOHN F. COSTELLO, Defendant.	At Law.	No. 44755.

9 It is hereby stipulated by and between counsel for the respective parties in this cause, in order to save the expense of printing, that the transcript of record in the case entitled John F. Costello, appellant, against Aulick Palmer, marshal of the United States for the District of Columbia, No. 1191, No. 5 special calendar in the Court of Appeals of the District of Columbia may be considered used and read as a part of the transcript of record on the appeal in this cause to the same intent and purpose as if all of the

matters and things contained in said transcript of record were incorporated in the transcript record of this cause.

CRANDAL MACKEY,
Attorney for Appellee.
LEVI H. DAVID,
Attorney for Appellant.

Supreme Court of the District of Columbia.

OCTOBER 22, 1902.

THE BOKEL GWYNN MCKENNEY CO., Plaintiff,
vs.
JOHN F. COSTELLO, Defendant.
} At Law. No. 44755.

Now comes here again the plaintiff by its attorney Levi H. David, and presents to the court here its bill of exceptions taken during the trial hereof, and prays that the same may be duly signed, sealed, and made part of the record, now for then, which is accordingly done.

Filed October 22, 1902.

In the Supreme Court of the District of Columbia.

THE BOKEL GWYNN MCKENNEY CO., Plaintiff,
vs.
JOHN F. COSTELLO, Defendant.
} At Law. No. 44755.

Be it remembered that at the trial of this case on June 26, 1902, before the Honorable T. H. Anderson, one of the justices of the supreme court of the District of Columbia, and a jury empaneled and sworn to try the issue raised herein, the plaintiff, to maintain the affirmative of said issue, produced as a witness, in its behalf, WALTER J. COSTELLO, who, being duly sworn, testified that John F. Costello was the defendant; that the defendant was his brother and was the same person named as grantor in a certain deed of conveyance from John F. Costello to Jeremiah A. Costello, dated May 4, 1901, and recorded May 8, 1901, in Liber 2570, folio 95 among the land records of the District of Columbia, conveying an undivided one-fifth interest in parts of lots 19 and 20 in square 455; that the grantee, Jeremiah A. Costello, therein named, was a brother of witness and said defendant; that the said property was all the real estate which his said brother, John F. Costello, defendant, owned.

* * * * * * *

11 Thereupon, to further maintain the affirmative of said issue, plaintiff produced MILTON STRASBERGER as a witness, who, after being duly sworn, testified that he is a lawyer and during the year 1901 was a member of this bar; that he had known the defendant and his two brothers, Jeremiah A., and Walter J. Costello for some years last past; that in March or April 1901, an account for $100.53 was placed in his hands by the plaintiff against the defendant, for collection, and that thereupon he notified the said defendant thereof; that he could not collect the said sum from the defendant, and suit was instituted to enforce collection; that on May 2, 1901, the suit was commenced before Justice of the Peace Bundy, and summons was issued and made returnable on May 4, 1901; that on said return day witness, as attorney for plaintiff, and the said defendant, appeared before the justice of the peace, and defendant moved for a continuance, until May 8th, 1901, which was granted; that the case was called for trial on May 8, 1901, but the defendant again requested and was granted a continuance until May 11, 1901, on which said last-named day defendant did not appear, and witness obtained judgment by default for plaintiff for the full amount sued for, with interest and costs. This witness further testified that on one occasion, while the said suit was pending, the defendant accompanied by his brother, Jeremiah A. Costello, came to witness' office and requested witness to agree to a continuance of said case, promising to pay the sum sued for.

12 Thereupon, JAMES M. RATCLIFFE was produced by plaintiff as a witness, who, after being duly sworn, testified that he was and is now an auctioneer in the city of Washington, D. C., and had been for a number of years; that he had large experience, extending over many years, in real-estate values in said city and District, and that he had personal knowledge of the "Costello property" located at 6th & G streets N. W., in said city and District, being the said property conveyed by said deed from John F. Costello to his brother, Jeremiah A. Costello; that about two years ago the said real estate was placed in charge of witness to sell; and that the said property would now sell for the sum of $23,000 to $25,000; that at the time witness had the same property under his control for sale—2 years ago—there was a trust of $18,000 upon it.

Thereupon, to further maintain the affirmative of said issue, the plaintiff produced as a witness, UPTON H. RIDENOUR JR., who, after being duly sworn, testified that he was a notary public in and for the District of Columbia, and held said office on May 4, 1901, and took the acknowledgment of John F. Costello to a certain deed bearing date May 4, 1901, to Jeremiah A. Costello, which appears by said instrument; that John F. Costello brought the deed to him and asked him to take his (Costello's) acknowledgment to said instrument; that he saw no consideration pass to John F. Costello, the grantor named in said instrument at the time witness took acknowl-

edgment; that Jeremiah A. Costello, the grantee, was not present when said deed was acknowledged; on cross-examination witness testified that it was not customary for notary to see the considerations pass.

13 Thereupon, the plaintiff produced as a witness THOMAS M. FIELDS, who, after being duly sworn, testified that he was an active practitioner at the bar and had been such for a number of years last past; that he has known every member of the Costello family since the year 1895; that he was well acquainted with John F. Costello, the defendant, and his brother, Jeremiah A. Costello; that witness had had occasion to and did make an exhaustive examination into and knew the financial condition of John F. Costello and his brother, Jeremiah A. Costello; that said John F. Costello was insolvent on May 4, 1901, and had been so for some time prior thereto; that the only property which said John F. Costello owned was an undivided one-fifth interest in certain real estate located at 6th & G streets N. W., in the city of Washington, D. C., and described in said deed from John F. Costello, bearing date of May 4th, 1901, and recorded May 8, 1901; that said grantee had never been engaged in business, and had no means or property on May 4, 1901, except one undivided one-fifth interest in said realty; that said interest was acquired by said grantor and grantee by descent from their father, who died intestate in the early part of the year 1901; that witness first became acquainted with the members of the Costello family by having for collection claims of creditors against said Walter J. Costello, John F. Costello and their father; that witness had frequently seen and conversed with all of the members of the Costello family about their financial and property matters, from time to time, and always had the greatest difficulty in forcing collections from them, and, in some instances, was wholly
14 unable to do so; and that he knew of the creditors whose claims against them could not be collected.

Thereupon, counsel for the plaintiff offered and produced in evidence without objection, the record of a certain deed from said John F. Costello to Jeremiah A. Costello, which reads as follows:

Deed.

Recorded May 8, 1901, 10.00 a. m., Liber 2570, page 95.

$1.00 int. rev. stamp affixed.

This indenture, made this fourth day of May, in the year of our Lord one thousand nine hundred and one, (1901) by and between John F. Costello and Agnes L. Costello, his wife, of the District of Columbia, of the first part and Jeremiah A. Costello of the same place, party of the second part.

Witnesseth that the parties of the first part for and in consideration of the sum of ten (10) dollars, lawful money of the U. S. A., to

them in hand paid by the party of the second part, receipt of which before the sealing and delivery of these presents is hereby acknowledged have given, granted, bargained and sold, aliened, enfeoffed, released, conveyed and confirmed and do by these presents give, grant, bargain and sell, alien, enfeoff, release, convey and confirm unto the party of the second part his heirs and assigns forever the following-described land and premises situate, lying and bet
15 ing in the city of Washington, District of Columbia, and distinguished as parts of lots Nos. 19 and 20, in square No. 455, contained within the following metes and bounds, viz: Beginning for the same at the northeast corner of said square and running thence south on Sixth street 25 feet, thence west 101 feet 6 inches to a public alley, thence along said alley 25 feet to G street and thence east along G street to the place of beginning, being an undivided one-fifth interest — said John F. Costello, in the said described real estate together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the party of the first part, of, in, to, or out of the said land and premises.

To have and to hold the said land, premises and appurtenances unto and to the only use of the party of the second part, his heirs and assigns forever.

And the said parties of the first part for themselves and for their heirs, executors and administrators, do hereby covenant and agree to and with the party of the second part, his heirs and assigns, that they, the parties of the first part and their heirs shall and will warrant and forever defend the said land and premises and appurtenances unto the party of the second part, his heirs and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof, or interest therein, by, from, under of through them the said parties of the first part, or either of them. And
16 further that the parties of the first part and their heirs shall and will at any and all times hereafter, upon the request and at the cost of the party of the second part his heirs and assigns, make and execute all such other deed or deeds, or other assurance in law for the more certain and effectual conveyance of the said land and premises and appurtenances unto the party of the second part his heirs or assigns as the party of the second part, his heirs or assigns or his or their counsel learned in the law shall advise, devise or require.

In testimony whereof said parties of the first part have hereunto set their hands and affixed their seals on the day and year hereinbefore written.

JOHN F. COSTELLO. [SEAL.]
AGNES L. COSTELLO. [SEAL.]

Signed, sealed and delivered in the presence of—
UPTON H. RIDENOUR, JR.

* * * * * * *

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

I, Upton H. Ridenour, Jr., a notary public in and for the said District, do hereby certify that John F. Costello and Agnes L. Costello, his wife, of the District of Columbia, parties to a certain deed bearing date on the 4th day of May, A. D. 1901, and hereunto annexed personally appeared before me, in the said District, the said John F. Costello and Agnes L. Costello being personally well known to me as the persons who executed the said deed, and acknowledged
the same to be their act and deed, and the said Agnes L. Cos-
17 tello being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her by me acknowledged the same to be her act and deed and declared that she willingly signed, sealed and delivered the same, and that she wished not to retract it.

Given under my hand and official seal this fourth day of May, A. D. 1901.

UPTON H. RIDENOUR,
Notary Public.

[NOTARIAL SEAL.]

and thereupon, counsel for plaintiff offered and produced in evidence without objection, the record of a certain deed of trust from said John F. Costello *et al.*, to Handy & Thyson, trustees, which reads as follows:

Trust.

Recorded May 7, 1901, 2.04 p. m. (15), recorded in Liber 2578, folio 24 *et seq.*

Rev. st. $1.00 affixed.

John F. Costello
to
Handy & Thyson, Jr. }

This indenture made this 7th day of May, in the year of our Lord one thousand nine hundred and one, (1901) by and between John F. Costello and his wife Agnes L. Costello, Jeremiah A. Costello, unmarried, Walter J. Costello, unmarried, Catherine C. Brooks and her
husband, Charles W. Brooks, and Mary C. Cahill and her hus-
18 band, Thomas F. Cahill, all of the city of Washington, District of Columbia, parties of the first part, (the said John F. Costello, Jeremiah A. Costello, Walter J. Costello, Catherine C. Brooks and Mary C. Cahill being the sole heirs-at-law of Jeremiah Costello, deceased) and Charles W. Handy and H. G. Thyson, Jr., of the same place, parties of the second part.

Whereas, the said John F. Costello, Jeremiah A. Costello, Walter J. Costello, Catherine C. Brooks and Mary C. Cahill are justly indebted unto Richard A. Johnson in the full sum of two thousand five hun-

dred (2500) dollars for which amount they have made and delivered there one (1) certain joint, and several promissory note of even date with these presents and payable to the order of the said Richard A. Johnson on or before six (6) months after date with interest at the rate of six (6) per centum per annum payable semi-annually until paid;

And whereas the parties of the first part desire to secure the prompt payment of said debt and the interest thereon when and as the same shall become due and payable together with all costs and expenses that may accrue thereon,

Now, therefore, this indenture witnesseth, that the parties of the first part in consideration of the premises and of one dollar lawful money of the United States, to them in hand paid by the parties of the second part, the receipt of which before the sealing and delivery of these presents is hereby acknowledged, have given, granted,
19 bargained, and sold, aliened, enfeoffed, released and conveyed and do by these presents give, grant, bargain and sell, alien and enfeoff, release and convey unto the parties of the second part, their heirs and assigns, the following-described land and premises: situate in the city of Washington, District of Columbia, known and distinguished as parts of *an* original lots No. 19 and 20 in square 455, beginning in the N. E. corner of said square and thence south on 6th street 25 feet, thence west 101 feet, 6 inches to public alley, thence north along said alley 25 feet to G St., thence east along G street, 101 ft. 6 inches to beginning, together with all and singular improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining and all the estate, right, title, interest and claim, either at law or in equity, or otherwise, however of the parties of the first part of, in, to, or out of the said land and premises.

To have and to hold the said land, premises and appurtenances unto and to the only use of the parties of the second part, their heirs and assigns in and upon the trust nevertheless, hereinafter declared,

That is, in trusts, to permit said John F. Costello, Jeremiah A. Costello, Walter J. Costello, Catherine C. Brooks and Mary C. Cahill their heirs or assigns, to use and occupy the said described land and premises and the rents, issues and profits thereof to take, have and apply to and for their sole use and benefit until default be made in the payment of the said promissory note hereby secured
20 or any installment of interest thereon when and as the same shall become due and payable or any proper costs, charge, commission or expense in or about the same. And upon the full payment of all the said note and the interest thereon and all other proper costs, charges, commissions, half commissions, and expenses at any time before the sale hereinafter provided for to release and reconvey the said described premises unto the said John F. Costello, Jeremiah A. Costello, Walter J. Costello, Catherine C. Brooks and Mary C. Cahill their heirs and assigns at their cost.

And upon this further trust, upon any default or failure being made in the payment of said promissory note, or of any installment

of principal or interest thereon, when and as the same shall become due and payable, on any proper costs, charge, commission or expense in and about the same, then and at any time thereafter, to sell the said described land and premises at public auction, upon such terms and conditions, at such time and place and under such previous public advertisement as the parties of the second part, their heirs, or the trustee acting in the execution of this trust, shall deem advantageous and proper, and to convey the same in fee-simple to and at the cost of the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase-money, and out of the proceeds of the said sale or sales; first, to pay all proper costs, charges, and expenses, including all taxes, general and special, due upon said land and premises at the time of sale and to retain as compensation a commission of five per cent. on the amount of said sale or sales; second, to pay whatever may then remain unpaid of
21 the said note and the interest thereon, whether the same shall be due or not; and last, to pay the remainder of said proceeds, if any there shall be, to the said John F. Costello, Jeremiah A. Costello, Walter J. Costello, Catherine C. Brooks and Mary C. Cahill, their heirs and assigns, upon the surrender and delivery to the purchaser, his her or their heirs or assigns, possession of the premises, so as aforesaid sold and conveyed less the expenses if any, of obtaining possession, it being hereby and by these presents understood, agreed and declared that immediately upon and from the date and conveyance of the purchaser, his, her or their heirs and assigns as herein provided for, the said John F. Costello, Jeremiah A. Costello, Walter J. Costello, Catherine C. Brooks and Mary C. Cahill, and each and every person then claiming any right to or possession of said premises so sold and conveyed, or any part thereof by, through or under said John F. Costello, Jeremiah A. Costello, Walter J. Costello, Catherine C. Brooks and Mary C. Cahill, other than the grantee or grantees in said conveyance shall be and shall be deemed and held to be a tenant or tenants at sufferance of the grantee or grantees named in said conveyance of the land and premises herein and hereby conveyed, subject to be determined as provided for in section 681 of the Revised Statutes of the United States, relating to the District of Columbia, chapter 19, and possession, of such land and premises may be recovered and obtained under and in the mode of procedure provided for in sections 684–'5–'6 of said Revised Statutes and said John F. Costello, Jeremiah A. Costello, Walter J. Costello, Catherine C. Brooks and Mary C. Cahill do hereby agree at their own
22 costs during all the time wherein any part of the matter hereby secured shall be unpaid or unsettled, to keep the said improvements insured against loss by fire in the name and to the satisfaction of the parties of the second part, who shall apply whatever may be received therefrom to the payment of the matter hereby secured whether due or not, and also to pay all taxes and assessments, both general and special, that may become due or may be assessed against said land and premises during the *consignees* of

this trust, and that upon any default or neglect to so insured, or pay taxes and assessments, any party secured hereby may have said improvements insured and pay said taxes and assessments and the expense thereof shall be charged hereby secured, and bear interest at the same rate as the said indebtedness hereby secured, and it is further agreed that if the property shall be advertised for sale in the provisions of this deed and not sold, then the said trustee shall be entitled to one-half the commission above provided to be competed on the amount of the debt hereby secured.

In witness whereof, the parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

JOHN F. COSTELL–. [SEAL.]
AGNES L. COSTELLO. [SEAL.]
JEREMIAH A. COSTELLO. [SEAL.]
WALTER J. COSTELLO. [SEAL.]
CATHERINE C. BROOKS. [SEAL.]
CHARLES W. BROOKS. [SEAL.]
MARY C. CAHILL. [SEAL.]
THOMAS F. CAHILL. [SEAL.]

Signed, sealed and delivered in the presence of:
CHARLES G. ALLEN.

* * * * * * *

23 DISTRICT OF COLUMBIA, *To wit:*

I, Charles Gordon Allen, a notary public in and for the said District, do hereby certify that John F. Costello and his wife, Agnes L. Costello, Jeremiah A. Costello, Walter J. Costello, Catherine C. Brooks, and her husband, Charles W. Brooks, and Mary C. Cahill and her husband, Thomas F. Cahill, who are personally well known to me as the grantors in, and the persons who executed the foregoing and annexed deed, bearing date on the 7th day of May, A. D. 1901, personally appeared before me, in the said District, and acknowledged the said deed to be their act and deed, and the said Agnes L. Costello, Catherine C. Brooks and Mary C. Cahill being by me privily examined and apart from their husbands, and having the deed aforesaid fully explained to them by me, acknowledged the same to be their act and deed, and declared that they had willingly signed, sealed and delivered the same, and that they wished not — retract it.

Given under my hand and official seal, this 7th day of May, A. D. 1901.

CHARLES GORDON ALLEN, [NOTARIAL SEAL.]
Notary Public, D. C.

And thereupon counsel for plaintiff offered in evidence docket, No. 49, of the supreme court of the District of Columbia and
24 the record and proceedings in this cause, showing the recovery of a judgment by plaintiff against defendant on the

11th May, 1901, for $100.53 and interest and costs, and an execution returned "*nulla bona*;"

The plaintiff then rested. Thereupon defendant moved the court to instruct the jury to return their verdict for the defendant which motion the court granted. The plaintiff then and there excepted to such ruling. The jury then returned their verdict, by direction of the court, for the defendant. The foregoing was all of the testimony in the case. The plaintiff's said exception was duly taken and reserved before the jury rendered their verdict, and was then and there noted by the presiding justice upon his minutes.

Wherefore the plaintiff now presents this, his bill of exceptions, and prays the court to sign and seal the same now for then, which is accordingly done, this 22d day of October, 1902.

T. H. ANDERSON, *Justice.*

I consent to the foregoing.

CRANDAL MACKEY,
Att'y for Jno. F. Costello.

25 *Directions to Clerk to Prepare Transcript.*

Filed October 23, 1902.

In the Supreme Court of the District of Columbia.

THE BOKEL GWYNN MCKENNEY CO., Plaintiff,
vs.
JOHN F. COSTELLO, Defendant. } At Law. No. 44755.

Mr. John R. Young, clerk.

DEAR SIR: Please prepare as and for the transcript of record on appeal of the above-entitled cause to the Court of Appeals the following:

1. The affidavit of John F. Costello traversing the affidavit of Albert H. Wilson.
2. The notice to plaintiff to show cause why defendant should not be discharged.
3. Defendant produced in open court under writ of *habeas corpus* (No. 328) and order directing that issues be framed on affidavit for *ca. sa.* and trial by crim. ct. No. 2, and that issues be tried by jury.

3½. Issues for trial.

4. Verdict and judgment for defendant and writ quashed.
5. Appeal to Court of Appeals and citation ordered.
6. Citation issued and service accepted.
7. Bond filed.

26

Memo. 8. Time extended for settling bill of exceptions until October 1, 1902; time for filing transcript of record in Court of Appeals extended until October 15, 1902.

Memo. 9. Time for settling bill of exceptions extended until November 1, 1902; time for filing transcript in Court of Appeals extended until November 15, 1902.

10. Stipulation between counsel.

11. Bill of exceptions.

12. This precipe.

LEVI H. DAVID,
Attorney for Plaintiff.

Washington, D. C., Oct. 23, 1902.

Messrs. H. E. Davis and C. Mackey, attorneys for defendant.

GENTLEMEN: Please take notice that I have this day filed with the clerk of the supreme court of the District of Columbia the foregoing direction for the transcript of record on appeal in the case of The Bokel Gwynn McKenney Company *vs.* John F. Costello, at law, No. 44,755.

Respectfully,

LEVI H. DAVID,
Attorney for Plaintiff.

Washington, D. C., Oct. 23, 1902.

27 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 26, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 44,755, at law, wherein The Bokel, Gwynn, McKenney Company is plaintiff and John F. Costello is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 30 day of October, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1258. The Bokel, Gwynn, McKenney Company, appellant, *vs.* John F. Costello. Court of Appeals, District of Columbia. Filed Nov. 15, 1902. Robert Willett, clerk.

IN THE

Court of Appeals, District of Columbia.

JANUARY TERM, 1903.

THE BOKEL,
GWYNN McKENNEY CO.,
APPELLANT,
vs.
JOHN F. COSTELLO,
APPELLEE.

No. 1258.

BRIEF FOR APPELLANT.

LEVI H. DAVID,
Attorney for Appellant.

WASHINGTON MONOTYPE PRINTING CO.
1903.

IN THE

Court of Appeals, District of Columbia.

JANUARY TERM, 1903.

THE BOKEL, GWYNN McKENNEY CO., APPELLANT,

v.

JOHN F. COSTELLO, APPELLEE.

No. 1258.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from the Supreme Court of the District of Columbia. This case was in this court on a former appeal, Costello *v.* Palmer, No. 1191, 30 W. L. R. 402.

The counsel for the respective parties on this appeal have entered into a stipulation, and have thereby agreed that the transcript of record on the former appeal may be read and considered as part of the record on this appeal, and for convenience the former record will be referred to as "Rec. A" and the record on this appeal as "Rec. B" (Rec. B, 5–6).

On May 2, 1901, the appellant, The Bokel, Gwynn McKenney Company, commenced an action in assumpsit against the appellee, John F. Costello, before a justice of the peace in this District, and process was issued and served on the defendant on the same day. It was made returnable May 4, 1901 (Rec. A, 5).

On the latter date the said appellee, Costello, executed a deed in fee conveying all of his interest and estate in parts of lots 19 and 20 in square 455, contained within certain metes and bounds, to his brother, Jeremiah A. Costello, who had full knowledge and notice of the institution and pendency of said action and of the right of the plaintiff to recover therein. The consideration named in the deed is $10. No consideration at all was paid for the said property, but the conveyance was made for the purpose of hindering or delaying the payment of the debt due appellant; and by the execution of said deed the appellant and grantor, John F. Costello, rendered himself wholly insolvent (Rec. A, 6–7).

On the return day, to wit, May 4, 1901, the parties appeared, and on motion of the defendant (appellee) the trial was continued until May 8, 1901 (Rec. A, 5).

On May 8, 1901, the said deed of conveyance was recorded (Rec. A, 6).

The parties again appeared before the justice on May 8, 1901, and on motion of the defendant (appellee) the trial was again continued, the date fixed for hearing being May 11, 1901, on which date plaintiff appeared; but the defendant failed to respond, and, after proof of its claim, judgment for the plaintiff for the full amount sued for and costs was rendered (Rec. A, 5).

A writ of *fi. fa.* was issued and a "*nulla bona*" return made, and a transcript of the judgment was duly entered and docketed in the Supreme Court of the District (Rec. A, 5). A *fi. fa.* again issued, and the marshal returned it "*nulla bona*" (Rec. A, 9).

Under Sec. 794, R. S. D. C., plaintiff filed an affidavit for a writ of *capias ad satisfaciendum*, the writ issued, and the body of defendant was taken by the marshal (Rec. A, 6–7).

The foregoing proceedings were had in Law Cause No. 44755, Supreme Court, D. C.

On June 25, 1901, appellant filed a petition for the writ of

habeas corpus in an independent proceeding, being entitled *Habeas Corpus*, No. 306 (Rec. A, 1-2). The writ issued, and petitioner was allowed to give bail pending a hearing.

The matter did not reach a hearing until January 22, 1902, when Mr. Chief Justice Bingham dismissed the petition and remanded the petitioner (Rec. A, 3).

From this order the said John F. Costello appealed to this court, and one of the main questions—if not the important and controlling one—involved in that appeal was whether the court below had jurisdiction to proceed in the case, the new Code, during the pendency of the case, having gone into effect.

The Bokel, Gwynn McKenney Company, appellee on that appeal, contended that the "right" involved was a "substantial right" under the Code, and whether the Code made provision for the issuance of the writ of *capias ad satisfaciendum* or not, that case was saved, and was properly triable under the law in effect at the date of the issuance of the writ.

This court affirmed the judgment, and remanded the cause for further proceedings under sections 794–5 of the Revised Statutes of the United States relating to the District of Columbia. Costello *v.* Palmer, 30 W. L. R. 402.

On June 23, 1902, the said John F. Costello, appellee here, filed an affidavit in the case, stating that he had read the affidavit filed on behalf of the plaintiff upon which the *capias ad satisfaciendum* had been issued; and further, that he, affiant, "did not convey away, lessen or dispose of his property rights and credits with intent thereby to hinder or delay the recovery of his debts as charged in plaintiff's affidavit;" and that he did not execute said deed to his brother for the purpose of hindering or delaying the plaintiff, and without consideration being paid therefor (Rec. B, 1–2).

The following issue was framed and ordered to be tried before the court and jury:

"Did the defendant, John F. Costello, on or about the

4th day of May, 1901, convey away, lessen or dispose of to his brother, Jeremiah A. Costello, his property rights or credits, with intent thereby to hinder or delay the recovery or payment of the debts of the said John F. Costello?" (Rec. B, 5).

The case came on for trial before the court and a jury on June 26, 1902 (Rec. B, 6).

The proof introduced by the plaintiff (appellant) at the trial, showed that on May 2, 1901, suit was commenced against John F. Costello, appellee, before a justice of the peace, to recover $100.53 and interest, and that on the return day, May 4, 1901, the defendant requested a continuance until May 8, 1901, which was granted (Rec. B, 7); that the defendant (appellee), John F. Costello, was the same person named as grantor in a certain deed executed and delivered by him to his brother, Jeremiah A. Costello, dated May 4, 1901 (the return day set for the trial of the case), and recorded May 8, 1901, in Liber 2570, Land Records, D. C., folio 95, conveying an undivided one-fifth interest in parts of lots 19 and 20 in square 455, and that said property was all the real estate owned by appellee (Rec. B, 6). The said deed was offered and received in evidence and is set out in the record, the consideration named being ten dollars (Rec. B, 8–9).

At the second time set for the trial, to wit, May 8, 1901, defendant (appellee) again requested and obtained a continuance, the case, on this occasion, being set down for hearing on May 11, 1901, at which time the defendant failed to appear, and judgment for plaintiff (appellant) for the full amount sued for with interest and costs, was entered (Rec. B, 7); that, during the pendency of the case, defendant promised to pay the debt, in the presence of his said brother and grantee (Rec. B, 7).

James W. Ratcliffe, an expert in values of real estate in the District, testified that he had personal knowledge of the real estate conveyed by the appellee to his brother for ten

dollars, and that the said real estate had been placed in charge of witness to sell about two years ago; that said property would now sell for $23,000 to $25,000; that two years ago there was a trust of $18,000 upon it (Rec. B, 7).

The notary who took the acknowledgment of the appellee to the said deed conveying the property to his brother was produced and he testified that the grantee was not present at the time, and that he, the witness, did not see any consideration pass (Rec. B, 7–8).

Further evidence of another witness established the facts that John F. Costello was insolvent on May 4, 1901, and had been so for some time prior thereto; that he then had no property other than the one-fifth interest in the said real estate which he conveyed to his brother for the nominal consideration of ten dollars; that witness always had the greatest difficulty in forcing collections from John F. Costello, and from the Costello family, and in some instances was wholly unable to do so (Rec. B, 8).

A deed of trust executed and delivered on May 7, 1901, by said John F. Costello, and Jeremiah A. Costello, *et al.*, to Handy and Thyson, trustees, to secure Richard A. Johnson the sum of $2,500, on the same real estate hereinbefore described, was offered and received in evidence, which said deed was executed three days after the said deed from John F. Costello to his brother, Jeremiah A. Costello, which latter deed conveyed all of his interest in said property for the nominal consideration of ten dollars (Rec. B, 10, 11, 12). The plaintiff then rested.

The defendant's counsel thereupon moved the court to instruct the jury to find for the defendant, which motion the court granted. Plaintiff duly excepted. Under the instruction of the court, the jury found its verdict in favor of the defendant (Rec. B, 14).

Judgment was entered on the verdict and the plaintiff noted and perfected its appeal to this court to reverse the said judgment (Rec. B, 5).

The principal question raised by this appeal is whether the plaintiff made out a *prima facie* case under the *ca. sa.* statute, so as to entitle it to go to the jury. The court below merely expressed an oral opinion that no such case had been presented.

Assignment of Errors.

1. The court erred in holding that the plaintiff's evidence was insufficient to show that the defendant conveyed away, lessened or disposed of his property, rights or credits, with intent thereby to hinder or delay the recovery or payment of his debts.

2. The court erred in deciding the question of intent in favor of the defendant, and in refusing to submit this question to the jury.

3. The court erred in holding that the plaintiff had not made out a *prima facie* case, and that the evidence was insufficient under sections 794–5, R. S. D. C., to be submitted to the jury.

4. The court erred in directing the jury to find its verdict in favor of the defendant.

5. The court erred in rendering judgment for the defendant.

Points and Authorities.

The assignment of errors may be appropriately discussed as if they were one, for the reason that there is but a single question involved on this appeal, namely, did the trial court err in directing the jury to find its verdict in favor of the defendant?

Sections 794–5, under which this proceeding was brought, provided as follows:

"If any plaintiff in a civil action, after judgment shall have been obtained by him, makes oath, according to law, that the defendant has conveyed away, lessened, or disposed of his property, rights, or credits, or is about to remove, or has removed, his property from the District, as the plaintiff

believes, with intent thereby to hinder or delay the recovery or payment of his debts, the clerk of the court shall thereupon issue a *capias ad satisfaciendum.*

"Upon the arrest of any such defendant under a *capias ad satisfaciendum*, he may be brought by the *habeas corpus* before the court, if in term time, and before one of the judges thereof in vacation, and may call upon the plaintiff to show cause why he, the defendant, shall not be discharged from imprisonment; and upon such notice, either party may demand a trial by jury; and thereupon the court or judge shall direct an issue or issues to be framed upon the affidavit so filed, and shall cause a jury to be impaneled and sworn to try such issue or issues, and if the finding of the jury shall be for the plaintiff, the defendant shall be thereupon remanded to prison" (also set out in chap. 55, p. 453, sec. 66, Abert's Compiled Stat.).

After the plaintiff closed its case, upon motion of the defendant, the trial court decided that the plaintiff's evidence was insufficient under the statute to entitle the case to be submitted to the jury, and thereupon directed the jury to find for the defendant.

The appellant respectfully submits that the evidence, set out in full in the transcript, was not only sufficient to be submitted to the jury, but it justified a verdict in favor of the plaintiff.

The statute only requires the plaintiff to prove that the defendant "has conveyed away, lessened or disposed of his property, rights or credits * * * with intent thereby *to hinder or delay* the recovery or payment of his debts."

The undisputed evidence showed that on May 2, 1901, the appellant commenced its action against appellee before a justice of the peace, and the summons was made returnable on May 4, 1901; that appellee, as defendant, appeared and moved for and was granted a continuance until May 8, 1901; that on that day he again asked for and obtained a further continuance until May 11, 1901; that on the said May 4, 1901, appellee conveyed away all of his property,

consisting of an undivided one-fifth interest in certain real estate in the District of Columbia, to his brother, who knew of the pendency of the suit and the embarrassed financial condition of the appellee, for a nominal consideration, expressed in the deed, of ten dollars; that even this sum, at the time of the execution of the deed, the notary, who took the acknowledgement of the grantor, did not see pass; that the grantee was not present when the deed was signed (Rec. B, 7–8); and that the appellee thereby rendered himself wholly insolvent. By the execution of the said deed, he divested himself of every vestige of property which might have been resorted to by his creditors.

On May 11, 1901, the date finally set for the hearing of the case, the appellee failed to respond, and judgment for the full amount sued for, with interest and costs, was rendered against him.

The deed was recorded on May 8, 1901, while the suit was pending. The real estate "would now sell for the sum of $23,000 to $25,000." Two years ago there was a trust of $18,000 upon it (Rec. B, 7). Appellee owned an undivided one-fifth interest in the same. This interest was sufficient to fully satisfy the appellant's said judgment. The said deed certainly hindered and delayed the plaintiff in its collection. It presented an obstacle in the way of a judgment creditor's bill, and would hinder and delay the collection of the judgment in such a suit.

In Nicholson *v.* Leavitt, 6 N. Y. 510, it was argued that an "intent to hinder and delay creditors, there being no intent to defraud them, will not make an assignment illegal; a positive intent to defraud must exist;" but the court by Gardiner, J., said: "The answer to this suggestion is, that a positive intent to defraud does not always exist where the inducement to the trust is to hinder and delay creditors, since the right of a creditor to receive his demand when due is as absolute as the right to receive it. It has always been understood that, where an individual has incurred an obligation to

pay money; the time of payment was an essential part of the contract; that, when it arrived, the law demanded an immediate appropriation by the debtor of his property, in discharge of his liability, and if he failed, would itself, by its own process, compel a performance of the duty."

In Read *v.* Worthington, 9 Bosw. (N. Y.) 617, Robertson, J., says:

"It has also been assumed that the defendants, although denying the charge in the complaint that the assignment in question was made with intent to hinder and defraud creditors, do not deny the charge that it was made with intent to delay them; and this is founded upon some supposed distinction between delaying and hindering. I should suppose a person who was hindered was effectually delayed; nor do I see how a man can be delayed without being hindered. To hinder one in his course is necessarily to delay him. Not being able to perceive the distinction I must hold that none exists. Many such pleonasms are to be found in old English statutes, where they are introduced for caution's sake, more than with any precise idea as to what they were intended to effect."

"A conveyance of personal property, by a debtor in embarrassed circumstances, for the purpose (known to the purchaser) of securing the same from attachment, is void as against creditors, although the debtor, at the time, believes that such conveyance is for the benefit of his creditors, and may intend that his creditors shall ultimately be paid." Kimball *v.* Thompson, 4 Cush. (Mass.) 441.

"The hindrance or delay of creditors is reprobated by the statute without regard to the duration of the hindrance or delay." Quarles *v.* Kerr, 14 Gratt. (Va.) 48.

"The word 'delay' has reference not merely to a question of time, *but to the interposition of obstacles* in the way of creditors with the fraudulent intent to hinder and delay." Linn *v.* Wright, 18 Tex. 317.

In 14 Am. and Eng. Encyc. Law, 2 Ed., p. 244, it is said:

"But in order to render a deed fraudulent, it is not necessary that the debtor should intend to entirely defeat the creditor in the collection of his claim. Creditors are entitled not only to be paid, but to be paid as their claims accrue, and a debtor has no more right to postpone payment simply for his own advantage, than to defeat it altogether. A purpose to hinder and delay a creditor is therefore fraudulent, although the debtor may honestly intend that all his debts shall ultimately be paid."

"The distinction between a mere intent to hinder and delay creditors and the intent to defraud them must not be confounded. The statute clearly recognizes this distinction and makes void all conveyances made 'with intent to hinder, delay *or* defraud' creditors. This language implies the intent to defraud, and it is frequently the case that the intent to defraud is something distinct from the mere intent to delay, and it is frequently the case that debtors with an honest intention to pay their creditors in the end, make some shift or transfer merely to gain time." Pilling *v.* Otis, 13 Wis. 495.

What was the intent of the appellee in conveying away the valuable real estate to his brother for ten dollars? Under the circumstances of this case, made at such a peculiar time, was not the deed made "with the intent thereby to hinder or delay the recovery or payment of his debts?" *Was not such the necessary result?*

This court, in the case of Wineland *v.* Wagenhurst, 30 W. L. Rep. 405, said·

"As we have before stated, the assignment to the complainant recites on its face the nominal consideration of $10; and in the bill, it is simply alleged that on the 11th of September, 1897, an assignment in writing was made, under seal, by R. M. Moore as settling partner to the complainant, of the whole and entire fund retained under the contract, 'predicated of a valuable and adequate consideration.' But of what this consideration consisted; when, and how it was paid, whether in full at the time of the assignment or after-

wards, or under what circumstances as showing the *bona fides* of the transaction, there are no allegations whatever. This is clearly insufficient, upon all the authorities." Wood *v.* Mann, 1 Sum. Rep. 506, 510; Flagg *v.* Mann, 2 Sum. Rep. 487, 550.

The court then proceeds to state specifically what must be alleged and proven by a person who claims as a *bona fide* purchaser.

After the plaintiff produced in evidence the deed from the appellee to his brother, together with proof of the attendant circumstances, was not the appellee required to answer by showing the "*bona fides* of the transaction?" Did not this conveyance, made under the circumstances shown by the evidence, positively show the intent on the part of the appellee to "hinder or delay" the appellant in the satisfaction of its claim rapidly maturing into a judgment? Did it not place an obstacle in appellant's way?

In the case of Lusk *v.* Riggs (Neb.), 91 N .W. Rep. 243, it is held that where a debtor in failing circumstances transfers his property to a near relative, the burden of proving a sufficient consideration and good faith is on the grantee.

"When the circumstances of the case are of such a character as to lead to the inference that there has been a fraudulent intent, the *onus* of disproving fraud rests on the parties maintaining the validity of the transaction." Zimmer *v.* Miller, 64 Md. 296.

"Gross inadequacy of consideration paid by grantee for the property is a badge of fraud." Fuller *v.* Brewster, 53 Md. 358.

Here the *prima facie* proof was that no consideration whatever—indeed, not even the nominal consideration of ten dollars—was paid by the grantee to or for the grantor.

"A bill was filed to set aside a deed on the ground that it was fraudulent as to creditors. The evidence showed that the grantee knew of the grantor's inability to pay his debts,

and that the necessary effect of the conveyance would be to hinder and delay creditors. It was also shown that the conveyance was made about the time complainant's indebtedness became due. *Held*, that there was evidence that the conveyance was fraudulent." Gebhart *v.* Merfeld, 51 Md. 322.

"Inadequacy of price, in connection with other sustaining proof, is good evidence in a court of law when a deed is sought to be avoided for fraud." Mayor *v.* Williams, 6 Md. 235.

"The motive or purpose with which a voluntarry transfer of property is made by a party indebted at the time is not material. Such conveyance is, without reference to the actual intent of the debtor, *prima facie* in fraud of creditors. This presumption of law, however, may be repelled by proving that the grantor at the time of the gift was possessed of other means amply sufficient to pay all his debts, and the *onus* of so proving is upon those seeking to uphold the gift." Goodman *v.* Wineland, 61 Md. 449; Ellinger *v.* Crowl, 17 Md. 361.

"A father being indebted and embarrassed, conveyed to his son land worth upwards of $20,000, for the money consideration expressed in the deed of $12,000, of which only $5,000 were in fact paid by the son in money. *Held*, that this was a voluntary conveyance to the extent of the excess of the value of the land beyond the $5,000, and was, therefore, void as to creditors who were such prior to and at its date; that whether such a deed can be supported or not depends on the condition of the grantor at its date. If he then had creditors who would be *hindered and delayed* in collecting their debts, although he was not in fact insolvent, still, so far as it is a voluntary conveyance or one resting upon natural love and affection, it is void." Worthington *v.* Bullitt, 6 Md. 172.

"A voluntary conveyance to children, the grantor being indebted at the time, is fraudulent against creditors, without any other evidence of fraudulent intention." Hoye *v.* Penn, 1 Bland. 28.

"A bill of sale, from father to son, of all of the former's personal property. *Held*, under the circumstances and in the absence of proof that the nominal consideration was ever paid to the grantor to be fraudulent." Earnshaw *v.* Stewart, 64 Md. 513.

In the famous Twyne's case (3 Rep. 80), badges or marks of fraud were pointed out by the court, and among them were:

1. That the conveyance was made pending the writ. To the same effect, 24 Wis. 416; 55 Iowa, 348; 41 N. H. 490; 31 Me. 99; 34 N. J. Eq. 115.

2. The recital of a fictitious consideration. To the same effect, 16 Fed. Rep. 850; 71 Ind. 461; 13 Allen (Mass.) 179; 26 N. Y. 382; 64 N. C. 374.

In De Walt *v.* Doran, 21 D. C. 177, it was held that a false statement of the consideration for a transfer tends to deceive creditors, and is a badge of fraud.

A voluntary conveyance by a husband to a trustee for the benefit of the wife, made pending an action against the husband, will be set aside at the suit of the plaintiff in such action after judgment. Barth *v.* Heider, 7 D. C. 71.

A badge of fraud is a fact calculated to throw suspicion on a transaction, *and calling for an explanation.* Peebles *v.* Horton, 64 N. C. 376.

Badges of fraud afford ground of inference from which the jury are authorized to conclude that a transaction surrounded by them is fraudulent. Sherman *v.* Hogland, 73 Ind. 472.

The conveyance by an insolvent debtor, pending suits against him, of all of his property, to a member of his family for a grossly inadequate consideration expressed, but never paid, *is conclusive* of his intent to defraud his creditors; and it is immaterial whether the grantee participated in his design. Beenes *v.* Sherwood, 45 Ark. 520.

A voluntary conveyance may be avoided by creditors upon allegation and proof that the debtor, at the time he made the conveyance, had no other property than that which

he could claim as exempt from execution. William *v.* Osborne, 95 Ind. 347.

Almost any unusual and suspicious act accompanying or relating to the transaction may constitute a badge of fraud. Brinks *v.* Heise, 84 Pa. St. 253; Mead *v.* Noyes, 44 Conn. 491; Crapster *v.* Williams, 21 Kan. 109.

Relationship is calculated to awaken suspicion; and dealings between near relatives are closely scrutinized. Seitz *v.* Mitchell, 94 U. S. 580; Sherman *v.* Hogland, 73 Ind. 473; Marshal *v.* Croom, 60 Ala. 121.

Where a father conveys all of his property to his two young sons, under suspicious circumstances, the method, the consideration thereof, the fact that the deed itself purports to have been given for a valuable consideration, and that the answers of the sons, under oath, aver that it was so given and was *bona fide*, will not sustain it as against the father's creditors. Hoboken Bank *v.* Beckman, 36 N. J. Eq. 83; see also Peyron *v.* Lemon, 67 Ala. 458.

The record shows that the deed from the appellee to his brother, for the expressed consideration of ten dollars, was executed on May 4, 1901, and that it was acknowledged on the same day, but was not recorded until May 8, 1901 (Rec. B, 8, 9, 10).

On May 7, 1901, three days after appellee had conveyed all of his right, title and interest in the real estate to his said brother for the nominal consideration of ten dollars, he, together with the ôther parties in interest, including his prior grantee, his brother, Jeremiah A. Costello, executed a deed of trust upon the property for $2,500 (Rec. B, 10, 11, 12). This trust was recorded on May 7, 1901. It is the regular deed of trust used in this District, and contains the usual provisions to permit "the said John F. Costello * * * to use and occupy the said described land and premises and the rents, issues, profits thereof, to take, have and apply to their (his) sole use," etc. It also calls for a release to him. He is there-

by expressly and conclusively conceded to be a part owner of the property by his own prior grantee, who joined in the said deed of trust. He was likewise so considered by all of the other parties to the deed. He even put himself under an equal personal liability for the indebtedness secured by this trust. This transaction is utterly inconsistent with the idea that the appellee had no actual interest in the property. It constitutes an express estoppel upon his grantee brother to deny that his grantor had any interest after the deed in fee. It alone ought to be conclusive not only of an actual intent to hinder or delay creditors, but of an actual intent to cheat and defraud them. There is no room to question the sufficiency of the evidence to show, at least, a constructive intent to hinder or delay creditors, and even a like intent to cheat and defraud them.

In Franklin *v.* Claflin, 49 Md. 24, the court said that "nothing can be more utterly inconsistent with a contract of sale purporting to be absolute than the existence of a right or interest over the property by the vendor. If such reservation is secret, it is evidence of collusion; if it is open, it tends *to hinder and delay* the creditor, and is legal or constructive fraud."

In view of the proof offered by the appellant at the trial of this case, it is respectfully submitted that the learned justice erred in granting the motion of the defendant to instruct the jury to find for the defendant. The evidence produced was certainly sufficient, under the statute, to require the defendant to put in his defense, if he had any. Surely, he should have been required to produce some evidence to explain the grossly inadequate consideration of ten dollars recited in the deed to his brother, made after he had obtained the continuance during the pendency of the suit; and he should have been required to answer, by proof, why he conveyed away the property while he was insolvent, and then, after he had divested himself of the title to this prop-

erty, he borrowed money on the same property, claiming to own an interest therein, to which his prior grantee assented.

Counsel for appellee have advised counsel for appellant that the brief for appellee will quote authorities at length upon the proposition that, even if the judgment be reversed, the appellee cannot again be taken in custody, and that, therefore, this appeal cannot avail the appellant.

It will be recalled that this same question was raised by the appellee in his motion to dismiss this appeal, and this court promptly overruled the motion. It is not, therefore, deemed proper to unduly prolong this brief by citing any additional authorities upon this question, for, in the typewritten brief filed in opposition to the motion of appellee to dismiss the appellant's counsel referred to many authorities upon which he still relies as to the point just mentioned.

The difficulties of proof, always in the way of creditors in this class of cases, will be recognized. Such transactions are studiously sought to be put beyond the reach of proof by creditors of the real intent. Such proof, for this reason, must necessarily be almost always circumstantial to a great degree, as the matters generally lie almost exclusively in the knowledge of the fraudulent grantor and grantee.

Conclusion.

It is respectfully submitted that the judgment should be reversed, and the cause remanded for a new trial.

LEVI H. DAVID,
Attorney for Appellan

Washington, D. C., *March*, 1903.